

#172

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

AND

IN THE MATTER OF THE COMPLAINT OF GRACE ARAGONA  
OF MISSISSAUGA, ONTARIO, ALLEGING DISCRIMINATION IN  
EMPLOYMENT BY ELEGANT LAMP CO. LTD. AND MR. A.  
FILLIPITTO ALSO OF MISSISSAUGA, ONTARIO.

DECISION

ED RATUSHNY  
BOARD OF INQUIRY

AUGUST 6, 1982



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On May 10th, 1982, I was appointed as a board of inquiry to inquire into the complaint of Grace Aragona that she was discriminated against in employment by Elegant Lamp Co. Ltd. A public hearing was conducted in Toronto on July 28th and 29th with counsel very ably presenting evidence and argument on behalf of the Complainant and the Respondents, respectively. Miss Janet Minor, of the Crown Law Office of the Ontario Ministry of the Attorney General, acted on behalf of the Ontario Human Rights Commission and Mr. Hugh McLean of Mississauga, barristor, acted on behalf of the Respondents.

In her Complaint, Mrs. Aragona indicates that she commenced work for Elegant Lamp Co. Ltd. on March 9, 1979 as an artist in the art department, that she worked diligently and that there were no complaints about her work. She quit her job on December 17, 1979. These facts are not in dispute.

However, she alleges that during the month of June, 1979, she began to encounter problems with "the boss", Mr. A. Fillipitto. According to Mrs. Aragona's written complaint:

On several occasions he said such things to me as "he would like to get into my pants and that he would like to go fishing with me without his wife." Furthermore, he would put his hands on my shoulders and tell me that I was it. In September and October of 1979, when he found out that I was getting married,



he said that my husband was no good and low down. In early December of 1979, he told me that I had ruined everything and he wanted to know how we were going to go out for dinner.

These allegations are largely disputed by the Respondents.

The Commission takes the position that the facts establish consistent, frequent, verbal harassment with a strong sexual connotation thereby creating a demeaning atmosphere in which Mrs. Aragona had to work, contrary to section 4(1)(g) of the Ontario Human Rights Code R.S.O. 1980, c. 340. This provision prohibits discrimination:

...against any employee with regard to any term or condition of employment, because of ... sex ...

The Commission also argues that her decision to quit, in the circumstances, constituted a constructive dismissal contrary to section 4(1)(b) of the Code which provides that employers shall not:

...dismiss or refuse to employ or to continue to employ any person ... because of ... sex ...

Mrs. Aragona quit work following a meeting with the President of the company on December 17, 1979, during which she raised these allegations with him for the first time. At the meeting, she was given no indication that anything would be done in response to her allegations.

It has been established in Ontario that "sexual harassment" constitutes discrimination on the basis of sex contrary to section 4 of the Code. In the Complaint of Cherie Bell Against Ladas and the Flaming Steer Steak House Tavern Inc. (August 12, 1980), Board Chairman Owen Shime elaborated:

The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. (p. 4)



It is to be noted that where the conduct is of a more subtle nature, the issue is how it "may reasonably be perceived". In other words, the conduct in question cannot be assessed only by the effect which it has upon a particular complainant (although this will be relevant to any remedy which is ordered). The objective standard must be met.

Chairman Shime expressed concern that the law not inhibit normal discussion or social contact between management and employees:

It is not abnormal, nor should it be prohibited activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits. (p. 5)

In the case at hand, there was no suggestion of coercion to reciprocate a social relationship. Rather, the present allegations are more closely related to "gender based insults and taunting" creating an unacceptable work environment.

However, Chairman Shime also expressed concern that the Code ought not be seen as inhibiting free speech. A supervisor and an employee should feel free to discuss sex as well as race or colour or creed:

Thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of the Code; it is only when the language or words may be reasonably construed to form a condition of employment that the Code provides a remedy. (p. 6)

It is also well to bear in mind the caution expressed by Chairman Cumming in the Complaint of Rosanna Torres Against Royalty Kitchenware Limited and Francesco Guercio (April 8, 1982):

There are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the workplace their relationships with the opposite sex, or in telling sex 'jokes'. It is not the intent, or effect, of the Human Rights Code, or the function of a Board of Inquiry, to pass judgment upon such persons. It is only 'sexual harassment' that is unlawful conduct. (p. 15)







Thus, sexual references which are crude or in bad taste, are not necessarily sufficient to constitute a contravention of section 4 of the Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman. The line will seldom be easy to draw, particularly where, as in the present case, there is considerable dispute as to what exactly was said and done.

Elegant Lamp Co. Ltd. was formed in 1967 with Mr. Donald McLeod as the president. He has continued as president to the present time. Since 1968, Mr. Adriano Fillipitto has been the Secretary-Treasurer and a part owner of the company's shares. In the beginning, the company employed only Mr. McLeod, Mr. Fillipitto and their respective wives. Apparently, the company prospered and grew to the point where, by 1979, there were some 35 to 40 employees. Generally speaking, Mr. McLeod is responsible for all sales and general administration while Mr. Fillipitto is responsible for all plant operations including hiring.

The company produces lamps and ceramic items such as figurines and jars. The "ceramic department" of the plant consists of three adjoining rooms in which three separate functions are performed. These were described as: cleaning or scraping; painting; and decals. Mr. Fillipitto had an office across a hallway from these rooms and would frequently "breeze in" to inspect the progress of the work and deal with any problems which might have arisen. The rooms were inter-connected so that he would also pass through one of the rooms on his way to another.

Mrs. Aragona, who is now 26 years of age, graduated from Grade 12 in 1973 and held a number of jobs from then until 1979. She applied to Elegant Lamp Co. Ltd. in response to a newspaper advertisement and was hired by Mr. Fillipitto in March of 1979. In view of some previous art training, she was assigned to the painting division



and, after some initial instruction by Mr. Fillipitto, developed into a good painter for purposes of the work required for her. Good painters were difficult to find at that time.

While there was no criticism of the quality of her work, Mrs. Aragona was not a steady worker. While the norm was a 40 hour week, she reached that number during only 10 of the 38 weeks of her tenure with the company. In fact, her average number of hours per week was only 28. She was soon asked by Mr. Fillipitto about her frequent absence and explained that she had been seeing doctors about a skin problem. This explanation was accepted and her irregularity was tolerated.

Mrs. Aragona testified that her skin problem had existed since about the age of 18. It does not cause discomfort but is a cosmetic problem. It involves discoloration which she described as "terrible looking" and as "embarrassing" and affecting her "psychologically". She went from one doctor to another seeking a cure but ultimately learned that there is no known cure for this condition.

When Mrs. Aragona commenced work, she joined two others in the painting room, namely, Heather McLeod and one Luigi, whose family name was not revealed in the testimony. The three of them would sit around a large table painting and chatting while they worked. Trolleys would be brought in with the items to be painted. Mrs. Aragona, generally, remained in "painting" although, occasionally, she was assigned to the "cleaning" or "ceramics" rooms. While Mr. Fillipitto's visits varied in frequency, Mrs. Aragona might see him as often as 4 or 5 times per day. In her words, he was "always on the go", briefly surveying their work or passing through on his way to another room.

The evidence clearly indicates that the work atmosphere at Elegant Lamp Co. Ltd. was generally pleasant and cheerful. Mrs. Aragona, herself, pointed out that Mr. Fillipitto would joke with people and that there was "always joking back and forth".



This was confirmed by another Commission witness, Mrs. Ognensis, who was an employee of the company for some five years before leaving at about the same time as Mrs. Aragona. She testified that Mr. Fillipitto was constantly joking and would say to the women: "I love you" in Spanish. (Apparently, a number of the employees were of Spanish descent and a variety of nationalities were represented amongst the employees). Mrs. Ognensis took it as a joke when he would say this to her. Her response would be to tell him to "Shut Up" and he would simply continue on his way. She also testified that all of the employees addressed Mr. Fillipitto as "Adriano" except Mr. McLeod, who called him "Charlie". Mrs. Ognensis' demeanour on the stand clearly indicated that she enjoyed the joking with Mr. Fillipitto. She smiled broadly and with a "twinkle in her eye" when she related how he would joke and how she would good-naturedly "put him down".

Heather McLeod, who was referred to earlier and who is also the daughter of Mr. McLeod, was also called as a Commission witness. She pointed out that Mr. Fillipitto would "joke around" a great deal and that everyone in the factory reacted to him "happily and jokingly".

Mr. Fillipitto also testified that the employees got along well at work. He could not recall one occasion when he was addressed as "Mr. Fillipitto". Rather, in the plant at least, he is called either "Adriano" or "Charlie Brown". He mentioned that, on occasion, he might come in "mad and serious" and the employees would start to joke and make him laugh. He was invited to the weddings of some of the employees.

Mr. McLeod expressed some pride in the working atmosphere of his company. He described it as "extremely happy" and attributed it to the good people who worked there. He described the comments as being entirely spontaneous and in the form of "quips" or "banter" rather than in actual conversations. In the course of such banter, and depending on the context and manner in which it was said, he would not be





surprised to hear a female employee told that she was "looking sexy". On the other hand, he would consider it totally unacceptable for someone to tell her he would like to "get into your pants". In all of the years of the company's existence, Mrs. Aragona's complaint was the first employee complaint ever received about anyone.

Mrs. Fissore, who was called by the Respondents, has been working at Elegant Lamp Co. Ltd. over the last nine years with the exception of three intervals when she returned to her native Argentina. She described the employees as being "like a family" — talking, laughing and joking. She confirmed that "Adriano" was not addressed as "Mr. Fillipitto" by any of the employees. She described him as being very friendly and kind with them. She pointed out that although he "screams and yells" he is very nice and everyone accepts him as he is. Sometimes the employees would answer back "worse things than he did". She related that when he would drop in to work in his shorts, the employees would make comments about his legs.

Mrs. Aragona testified that in June of 1979, Mr. Fillipitto began to make comments to her of a sexually harassing nature. These caused her to feel very uncomfortable and uneasy. She stated that she never encouraged him or returned his comments but told him that she did not like them and let him know that she did not appreciate them. She claims that he treated her response as a joke. In July, she was so upset that she saw her doctor, who prescribed tranquilizers, which she took until a couple of months after her employment terminated. No medical reports were introduced and she could not remember the name of her doctor.

She was married on October 27th. On December 14th, she became particularly upset by one of the comments and returned home in tears. The following Monday, she and her husband went to see Mr. McLeod and complained about Mr. Fillipitto's conduct. Mr. McLeod was shocked by the allegations of sexually explicit comments and called in Mr. Fillipitto, who was also shocked, according to Mr. McLeod. There is





conflicting evidence as to what exactly was said during this meeting. Apparently, there were some denials but Mr. Fillipitto also stated that if he had offended anyone he was sorry.

Against this general background, it is necessary to examine each of the alleged incidents individually and then collectively to determine whether all or some have been established and, if so, whether they meet the legal criterion described earlier as constituting "sexual harassment" and, therefore, discrimination by sex contrary to section 4 of the Ontario Human Rights Code.

In her Complaint, Mrs. Aragona stated that Mr. Fillipitto "would put his hands on my shoulders and tell me that I was it". However, she did not repeat this allegation in her testimony and offered no evidence in support of it. It must be treated as totally unfounded.

In her Complaint, Mrs. Aragona stated that on several occasion he said such things as "he would like to go fishing with me without his wife". In her testimony, she merely said that he invited her to go fishing (without any reference to his wife). On cross-examination, she attributed to him, the words: "Let's go fishing on the week-end", again, without reference to his wife. She testified that she keeps to herself and made no comment in return but felt uncomfortable. Mrs. Ognensis testified that she once heard Mr. Fillipitto invite Mrs. Aragona fishing but her response was simply: "No Way".

Mrs. Fissore testified that Mr. Fillipitto had also invited her fishing. However, there was no doubt in her mind that he was joking. Her response was: "Let's go". However, that would be the end of it and he would never attempt to follow up in any way.

Mr. Fillipitto owned an old, wooden boat which was stored outside of the factory. The motor and other gear was stored inside. He and Mr. McLeod and the latter's son



would try to get away early on a Friday to go fishing — perhaps twice a summer. According to Mr. McLeod, on such a day, while the motor was being put on the boat and the gear loaded, there would be many light-hearted comments from the women on the production table. They would, for example, complain that they were not allowed to go along.

The facts as presented clearly do not establish any element of harassment in relation to the comments with respect to fishing. Mrs. Aragona described these comments as constituting the first incident so that they could not have been misinterpreted in the light of other, more serious comments. It also appears as though this was the only incident which she specifically mentioned to Mrs. Ognensis and to her husband (apart from the comments involving him) when she complained to them at various times about Mr. Fillipitto. On the evidence presented, the conclusion is inescapable that by any reasonable standard, Mrs. Aragona totally over-reacted to the comments about going fishing.

In her Complaint, Mrs. Aragona stated that "he told me that I had ruined everything [presumably, by getting married] and he wanted to know how we were going to go out for dinner". She did not refer to this in her testimony. Nevertheless, Mr. Fillipitto readily agreed that he asked employees to go out for dinner but, apparently, only in the same manner as he asked them to go fishing. He testified that he never goes out for dinner himself.

Mrs. Aragona also testified that he told her she had "nice looking, sexy legs". She said that she would tell him that she did not appreciate those comments but he would "take it as a joke" and leave. Mr. Fillipitto also agreed that he would make such comments about legs but denied that Mrs. Aragona had ever complained and, indeed, pointed out that he was, on occasion, the object of similar comments from the employees.



Mrs. Aragona testified that on one occasion a "professor" visited the factory from Italy. She claimed that Mr. Fillipitto introduced her "like a whore" by asking her to take him out. On cross-examination she added that she was also asked to "give him a good night". She did not feel any obligation to do so and would have quit on the spot if there was any such expectation. However, she did feel humiliated. Mr. McLeod testified that the person in question was not a professor but a sculptor. He was referred to as "The Maestro" because of the perfection in his work. Mr. Fillipitto could not recall suggesting that she go out with him.

Of course, the exact context, specific wording, tone of voice and facial expression are all relevant to whether or not an incident such as this carried sexual overtones sufficient to constitute harassment. Mr. Fillipitto could not recall suggesting that they go out together. In view of her over-reaction to the fishing incident, the significant elaboration during cross-examination upon her original version of the words used and her reference to the visitor as a "professor" rather than "The Maestro", this alleged incident cannot be accepted as having been proven to the extent of establishing harassment.

However, there were two incidents which, if established, would clearly constitute sexual harassment and this was readily conceded by Mr. McLeod. These are the allegations that Mr. Fillipitto said that he "would like to get into your pants" and that he "could lay you better than your husband". Mrs. Aragona claimed that he made the comment about getting into her pants on two or three occasions and that Heather McLeod was present at the time.

However, Heather McLeod offered no support, whatsoever, for this allegation. Nor was Luigi, the other person present in the painting room, called as a witness. It is true that Heather McLeod is the daughter of the president of the Respondent company and has known the Respondent Fillipitto for many years. However, she was called as a





Commission witness and there is no suggestion whatsoever that she was not telling the truth. Indeed, she testified that Mr. Fillipitto did joke with Mrs. Aragona and, occasionally, with a sexual connotation. However, she pointed out that while she might blush she would "go along with it". She did nothing to discourage this conduct and did not appear to be upset. In view of the absence of any privacy in this work environment and the open nature of the "bantering" which occurred, it is significant that no other witnesses could be called to support these serious allegations.

Mr. Fillipitto emphatically denied making these last two statements. He claimed that he does not use this kind of language with anyone. Mr. McLeod expressed surprise at these allegations and simply could not envision Mr. Fillipitto using the expressions "lay" or "get into your pants". He pointed out that they were simply "too Canadian" to be a part of his "jargon". It was apparent from Mr. Fillipitto's testimony that his English is rudimentary and totally lacking in refinement or subtlety. Mr. McLeod pointed out that he is very much a "family man" who spends his week-ends, together with his brothers in the Italian community. He described him as a "close home-body" whose home was "his whole life". It was difficult, for example, to persuade him to accompany Mr. McLeod on business trips for purchasing materials, where his expertise would be valuable. As counsel for the Commission quite properly conceded, Mr. McLeod was a forthright and impressive witness.

Indeed, there may well be some validity to the contention that the phrases in question seem more familiar to Mrs. Aragona than to Mr. Fillipitto in light of her blunt description of being treated "like a whore" on one occasion. It is the finding of this Board that the allegations with respect to these two statements have not been established.

Credibility is often difficult to assess, particularly when the events have occurred some three years in the past and depend upon detailed nuances for their



proper interpretation. There is seldom a single factor which will establish the truth of one version of the facts. Nevertheless, in the present case, there is a cumulation of factors which indicates that the version of the Respondents is to be preferred.

Discrepancies between the signed Complaint and the Complainant's testimony may be expected on occasion. However, in the present case they include the complete abandonment of perhaps the most significant allegation of harassment, since it suggested touching as well as oral comments. The Complaint states that "he would put his hands on my shoulders". The implication is that this occurred on more than one occasion. It is also significant that the phrase "without his wife" was abandoned during Mrs. Aragona's testimony. These discrepancies suggest not only some lack of credibility but perhaps, more seriously, some laxity in making allegations of this nature.

Mrs. Aragona's credibility also suffers from her insistence that she normally used the address "Mr. Fillipitto" rather than "Adriano". This is contrary to all of the other evidence. Moreover, while testifying at the hearing, she freely and comfortably referred to him as "Adriano". This "colouring" of her evidence suggests an attempt to exaggerate the formality of her relationship with him.

A tendency to exaggerate her evidence may also be apparent from her statement that upon quitting her job on December 17th, she did not wait until after Christmas but started searching for a job before Christmas. Her husband testified that she waited until the New Year.

There remains to be considered the allegations of insults directed at the Complainant's husband, Mr. Aragona. Mrs. Aragona testified that Mr. Fillipitto told her she should not have married him — that he was "no good". She claims that it was a comment about her husband on December 14, which caused her and her husband to see Mr. McLeod. She could not remember exactly what was said but considered it to be



extremely degrading of the Calabrese, the origin of her husband. Rather strangely, however, her husband testified that, while he could not remember what the alleged remark was on the last day, it was not about him on that occasion.

Of course, Mr. Fillipitto is also of Italian descent and Mrs. Aragona was aware that he also has Calabrese family ties. Mr. Fillipitto stated that his words were: "Why you marry an Italian? We are the worst people". He added that he probably commented that the Calabrese were even worse. In all of the circumstances, it is difficult to characterize these comments as being of a sexually harassing nature. Some might consider them to be in poor taste. Others might consider them to be humorous, in the special context of Mr. Fillipitto's own national origin.

There is no doubt that considerable "banter" and "teasing" occurred. There is also no doubt that there were many comments with sexual connotations. However, the evidence indicates that the employees were willing participants who enjoyed the atmosphere and who "gave" as much as they "took". It is true that, in response to a question during examination-in-chief, Mrs. Ognensis stated that it "wasn't very nice the way [ Mr. Fillipitto ] treated employees". However, her demeanour at that time, as well as her other testimony, totally contradicted those words. Mrs. Fissore thoroughly enjoyed the work environment and kept returning after lengthy visits to Argentina. Mr. McLeod took sincere pride in what he described as "an extremely happy atmosphere" in which to work.

It is difficult to explain Mrs. Aragona's unique reaction to Mr. Fillipitto. The evidence does not support the contention that she was singled out for special treatment. She may be a particularly private and sensitive individual and her sensitivity may have been compounded by the personal "embarrassment" and "psychological" effect of her skin problems. During cross-examination, she mentioned that she "keeps to herself". These factors also may have influenced the effectiveness





of any attempted communication to Mr. Fillipitto that she objected to his comments.

In the case of Bundy v. Jackson 641 F. 2d 934 (1982), Chief Judge Skelly Wright discussed the difficulties in expecting the employee to prove that she "resisted" the alleged harassment:

If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable ... The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. (at p. 946)

These comments are appropriate where, as in that case, the complainant proves that she was a victim of a practice of sexual harassment and a discriminatory work environment permitted by her employer.

However, in the present case, the proven conduct was freely accepted and enjoyed by the other employees. In the circumstances, it could not "reasonably be perceived to create a negative psychological and emotional work environment". Where there is general acceptance but where an individual employee does not care to participate, that feeling should be expressed directly and unambiguously. The objective standard could then be applied to that individual in light of the additional fact of expressed disapproval.

For example, a comment about one's legs might be returned with gratitude for a perceived compliment, with repartee or with a clear statement that such comments are not acceptable to the individual involved. Subsequent comments in the face of the last response could well cross the line of harassment. Of course, much will depend on the circumstances. A businessman who wears shorts to work or a secretary who wears a short mini-skirt might well invite such comments.





The evidence as to Mrs. Aragona's reaction was conflicting. She claims that she told Mr. Fillipitto that she did not appreciate the comments but that he treated her responses as a joke. He stated that she never complained to him but when he joked, she would joke back. It is obvious that what Mrs. Aragona perceived to be an expression of her disapproval, Mr. Fillipitto perceived to be a joking response. Perhaps that is understandable considering the spontaneous nature of the comments, his command of English and the fact that the normal response was not meant to be taken seriously. For example, when Mrs. Fissore responded "Let's Go", he obviously did not expect her to come fishing with him. Heather McLeod could remember nothing done by Mrs. Aragona to discourage the conduct in question. On the contrary, she stated that she would "go along with it". No evidence, apart from that of Mrs. Aragona herself, was presented to indicate that she had expressed her disapproval to Mr. Fillipitto. He testified that if she had told him to stop joking he would have done so and there is no reason to disbelieve this testimony.

In all of these circumstances, this Board is of the view that the evidence presented does not establish that any party has contravened the Ontario Human Rights Code.

Dated this 6th day of August, 1982.

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Ed Ratushny  
Board of Inquiry

